MOJTABA MOKTARIGHAHI ALI

v.

PP

HIGH COURT MALAYA, PULAU PINANG
MOHD AMIN FIRDAUS ABDULLAH J
[CRIMINAL TRIAL NO: 45-44-09/2011]
1 AUGUST 2012

CRIMINAL LAW: *Dangerous Drugs Act - Section 39B(1)(a) - Trafficking - 2751.7g methamphetamine found in travelling baggage's secret compartment - Baggage and tag bore accused's name - Incriminating substance not visible to naked eye - Whether accused had knowledge, possession and control of drugs - Whether prima facie case had been established*

CRIMINAL PROCEDURE: *Mens rea - Inference from facts established - Whether accused had knowledge of nature of drugs concealed inside baggage - Baggage travelled in few places - Whether reasonable doubt as to real owner of baggage - Possibility of exchange/misplacement/manipulation of baggage - Whether unknown person had access to original baggage and created secret compartment - Whether accused an innocent carrier*

The accused, an Iranian national, was charged with trafficking in 2751.7g of methamphetamine, an offence under s. 39B(1) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act. The accused had taken a flight from Dubai Airport and transited in Singapore before arriving in Bayan Lepas International Airport, Pulau Pinang. The accused stated that he was in Malaysia for a holiday and to meet his friend, one Mohamed. As the accused placed his bag ('P12') in the scanning machine at the arrival hall, the customs officers detected a suspicious-looking image. Although P12 was emptied and scanned three times, the image continued to surface. Further probing gave away a secret compartment which concealed carbon packages containing crystalline substances wrapped with transparent plastic. The accused was immediately detained. A chemist report later confirmed that the substances were indeed 2751.7g of methamphetamine. It was undisputed that the baggage tag ('P12A') attached to P12 bore the accused's name and its details were identical to that of the claim tag in his possession. P12 was

A under the accused's control on arrival at the airport and he had even admitted to the customs officers that P12 belonged to him. Ultimately, the drugs were found in a huge amount. The court drew an inference that the accused had knowledge of the nature of the drugs concealed inside the specially constructed or modified
B bag and was conscious of its presence. At the close of the prosecution's case, a *prima facie* case was ruled established against the accused and his defence was called. The issues raised before the court were: (i) whether P12, containing the drugs, was the same baggage that the accused had checked in at Dubai Airport
C when it arrived at the Bayan Lepas International Airport or had it been misplaced or exchanged somewhere along the flight; or (ii) whether person or persons unknown to the accused had access to his original baggage and had created a secret compartment inside P12 to conceal the drugs.

D

Held (convicting and sentencing the accused to death):

(1) The prosecution had proved its case beyond reasonable doubt. The defence had not rebutted the presumption of possession and failed to raise a reasonable doubt on the prosecution's
E case. (para 156)

(2) The accused's claim that P12 had been manipulated or tampered by certain person or persons to make a secret compartment and concealed the drugs did not make any
F sense. He did not lead a shred of evidence to show that he had enemies that would have done it for revenge. If there were, the accused did not give evidence on why they would have done so. Assuming that the person intended to do so, it would be very difficult to gain access to P12 which had
G already been checked in at the Dubai airport. In all likelihood, he would have been caught. Creating such a secret compartment would have taken a lot of time in the presence of security personnel and closed circuit television. (paras 130-131)

H

(3) The accused was not an innocent carrier. There was never a complaint by the accused to the officer in charge that someone had meddled with his bag. The accused was not telling the truth because he was caught red-handed with the
I incriminating drugs. Besides, the officer in charge testified that

he had arrived at the carousel area before all baggage was loaded down onto the carousel. He would have known as he was at all material times, beside the carousel. (paras 132-134)

(4) An inference was drawn that P12 belonged to the accused and there was no exchange of it and it was not misplaced. There was no probability of P12 being misplaced or exchanged for a similar baggage as P12A with the name of the accused, the flight number and the baggage number was attached to its handle. The tags had been issued and printed by a computer by the check-in agent. (para 138)

(5) The failure to see whether the clothes inside P12 fitted the accused did not weaken the prosecution's case as there was sufficient evidence to show that P12 belonged to the accused. The defence of the accused was a bare denial and his feeble attempt to explain how he came into possession of the drugs was not reasonable. It could also be inferred that Mohamed did not exist and was fabricated by the accused to show his innocence. (paras 151 & 153-155)

Case(s) referred to:

Adekunle Johnson Oshodi v. PP & Other Appeals [1998] 1 CLJ 515 ***(refd)***
Ahmad Najib Aris v. PP [2007] 2 CLJ 229 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***
Goh Ah Yew v. PP [1948] 1 LNS 13 HC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Leow Nghee Lim v. Reg [1955]1 LNS 53 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 736 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Badrulsham Baharom [1988] 1 LNS 58 ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Lim Boon Hock [2009] 3 CLJ 437 ***(refd)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
PP v. Salleh Zakaria & Anor [2010] 4 CLJ 671 CA ***(refd)***
PP v. Suzie Adrina Ahmad [2006] 3 CLJ 889 CA ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC ***(refd)***

A *Wjchai Onprom v. PP [2006] 3 CLJ 724 CA* ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633

Legislation referred to:
Crimininal Procedure Code, ss. 180(1), (2), (3), (4), 182A(1)
B Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a), 39B(2)
Evidence Act 1950, ss. 90A(6), 114(e)

Other source(s) referred to:
Ratanlal's Law of Crimes, 14th edn, p 379
Wharton's Law Lexicon, 14th edn, p 777
C

For the prosecution - Nur Sarah Dina Baharudin, DPP
For the appellant - Thangesvaran M Krishnasamy; M/s K Thanges & Assocs

Reported by Najib Tamby

D

JUDGMENT

Mohd Amin Firdaus Abdullah J:

E **[1]** The accused person, an Iranian national, now 27 years old, was charged with the following charge:

> Bahawa kamu pada 16 Februari 2011, lebih kurang 3.15 petang di Balai Ketibaan Lapangan Terbang Antarabangsa Pulau Pinang,
F di dalam daerah Barat Daya, di dalam Negeri Pulau Pinang, telah didapati mengedar dadah berbahaya iaitu Methamphetamine, seberat 2751.7 gram dan dengan itu, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

G **Prosecution Case**

[2] The prosecution called a total of nine witnesses to present its case and its case unfolded when customs officer named Rose Syila bt Rodaei (PW4) gave evidence that on 16 February 2011
H she was on shift duty from 2pm to 10pm at the scanning machine in the Arrival Hall of the Bayan Lepas International Airport in Penang.

[3] At 3pm, a fair-skinned male passenger put his black bag on the scanning machine to be scanned and in the midst of scanning
I PW4 saw a suspicious image of green and chocolate colour. She

then asked fellow customs officer Hazrir bin S Efendi (PW5) to check the bag and saw PW5 and this passenger subsequently identified as the accused in this case took out all the clothes from the black bag. When the bag was empty, PW5 requested PW4 to scan the bag again and despite being empty, the same image surfaced on the scanning machine screen.

[4] Both PW4 and PW5 then called their superior officers Rushaidi bin Ludin (PW6) and Tarmizi bin Johari and when both of them came, PW6 directed PW4 to scan for the third time the empty bag to confirm the suspicious image. The same image again surfaced on the screen after the third scanning. PW6 next asked the accused to put back all the clothes into the black bag and bring the bag into the examination room. After this, PW4 resumed her routine duty and did not know what happened to the accused subsequently.

[5] PW5 gave evidence that on 16 February 2011, he was on duty together with PW4 at the airport from 7am to 10pm and at 3pm that same day, his colleague PW4 enlisted his help to check the black bag (exh. P12) of the accused after she saw a suspicious image appearing on the scanner screen. PW5 described the black bag as quite big with wheels and the brand name is "Eminent." PW5 then requested the accused to bring P12 to a nearby counter for examination and after the accused had put the bag (P12) on the counter, PW5 asked for his passport and directed him to open the bag.

[6] After looking at the passport, PW5 found out that the name of the accused is Mojtaba Mokhtarighahi, a citizen from Iran. After the accused had opened the bag, PW5 together with the accused emptied out the clothes from the bag. PW5 found nothing inside the bag nevertheless he lifted up the bag and felt it was unusually heavy. He took the empty bag to be scanned for a second time and saw the same suspicious green image still appearing on the scanner screen and he asked PW4 to call their supervisors in order to inform them about the situation.

[7] After PW6 and Tarmizi bin Johari came to the scene, PW5 narrated to both of them about what had happened and he handed over the passport of the accused together with the black bag (P12) to PW6 for further action. After the handing over, PW5 continued with his normal duty and did not know what his supervisors did with P12 and the accused.

[8] PW6 testified that on 16 February 2011 at about 3pm, he was on duty in the green lane at the passengers' arrival hall in the airport and at that time, a flight from Singapore had landed. He observed a fair-skinned male passenger wearing a white shirt who was the last person and being the last passenger to arrive at the baggage section and he directed him to have his bag scanned by his officers. Later PW5 called him and informed him about a suspicious image appearing on the screen of the scanning machine and he went over to the scanner with another officer named Tarmizi bin Johari.

[9] On reaching the location of the scanning machine, PW6 took the empty black baggage (P12) with wheels carrying the brand name "Eminent" and instructed PW4 to scan it and the suspicious image again surfaced on the screen. PW6 lifted up the empty baggage and felt it to be unusually heavier than an empty baggage. Following this, PW6 and the passenger later identified as the accused went into a Search Room.

[10] In the room, PW6 and Tarmizi examined the interior of the baggage but found nothing suspicious. Despite this, PW6 further testified "Kami jumpa ada skru di bahagian dalam empat penjuru dilekat dengan salotape" yet they still could not find anything. Nonetheless, further examination yielded the presence of a secret compartment inside the baggage and they then scratched the side section with knives. PW6 dug it with his right hand and felt something like salt believing it to be drugs. He did not open the secret compartment and telephoned the Customs Narcotics Division and informed the personnel there about the discovery and asked them to come immediately to the Penang Bayan Lepas International Airport.

[11] When Mohammad Nizam bin Othman (PW7) and his officers from the Customs Narcotics Division arrived at the airport around 3.50pm, PW6 briefed PW7 about the incident and then handed over the black baggage (P12) a backpack (P14), the accused passport, two boarding passes that is from Dubai to Singapore and from Singapore to Penang, a Samsung hand phone and a departure card to PW7 and another officer called Yuslizan bin Yusof. The green backpack was found on the person of the accused and PW6 did not take out the things from it. After the handing over, PW6 resumed his normal duty.

[12] Mohammad Nizam bin Othman (PW7) testified that on the 16 February 2011 he received a telephone call from the Special Unit in Passengers Control at the Penang Bayan Lepas International Airport informing him that they had detained an Iranian man, subsequently identified as the accused in this case, suspected of bringing drugs inside his baggage. Upon receiving the information, he brought together a team and at 3.30pm, they straight away headed to the airport from the Narcotics Unit at Bagan Jermal, Seberang Perai. They arrived at the airport at about 3.50pm.

[13] PW7 immediately entered the room of the Office of the Special Unit for Examination of Passengers (Unit Khas Pemeriksaan Penumpang) where he met PW6 and Tarmizi bin Johari. At the same time, he noticed the presence of the accused and a black bag (P12) and a green backpack (P14) on the table in the Meeting Room. PW6 gave a brief narration on what had happened to PW7 and handed over to him the passport of the accused, a departure card, two boarding passes and a Samsung hand phone.

[14] PW6 then showed PW7 the secret compartment inside the black bag (P12) and PW7 saw carbon packages containing crystalline substances wrapped with transparent plastic. At that time, PW7 just only looked at them after being shown the secret compartment and the packages, he ordered his customs officer to handcuff the accused.

[15] While he was observing the black bag (P12), PW7 noticed a baggage tag with the name of the accused and the flight numbers SQ 453 and MI 360 attached to the bag. (At this juncture, learned defence counsel objected to the admissibility of the baggage tag which he argued was not in compliance with s. 90A of the Evidence Act 1950. The court reserves the question of its admissibility on a point of law but later at the trial, he withdrew his objection).

[16] After this, PW7 brought the accused and the exhibits back to Bagan Jermal in Seberang Perai by the departmental car where customs officer Yuslizan bin Yusof was the driver and PW7 sat beside him. The accused sat behind with customs officer named Selvaraj a/l Mariaman sitting beside him and all the exhibits put on the car seat beside the accused. They reached the Narcotics Unit

there at about 5.30pm and PW7 instructed the accused and all the exhibits to be taken to the Waiting Room in the office. The accused was guarded by Yuslizan bin Yusof.

[17] Further PW7 instructed woman customs officer named Chin Chaw Tee to take down notes of the 100% examination of the exhibits proceeding which started at about 6.45pm and customs officer Tan Hun Geap (PW1) to act as a photographer while the examination was being conducted. At the beginning, a body search was carried out on the accused (although no evidence was led to show whether any illegal items were found on the person of the accused; from a perusal of all the relevant evidence led, the court infers that nothing illegal was discovered).

[18] PW7 then conducted a 100% search on the contents of the black 'Eminent' bag (P12) and unzipped the bag and took out all the clothes. Next he opened the rubber lining around the interior of the bag with a knife and a screw driver to look at the specially modified or constructed secret compartment inside it. PW7 saw two blue carbon paper packages wrapped with transparent plastic embedded inside the left and right sides of the compartment and marked the two packages as "C11A" and "C11B" and put down his signatures and the dates. He directed PW1 to take photographs of the secret compartment and these two packages.

[19] PW7 then moved the position of the two packages and discovered another space closed with cellophane tape and removed the tape and found another three carbon paper packages wrapped with transparent plastic and marked them as "C12A", "C12B" and "C12C". He again directed PW1 to snap photographs of the three packages and carried out a test on samples taken from "C11A" and "C12A" with a test kit and the result showed them to be the drug methamphetamine. In consequence of the positive result, PW7 administered a warning to the accused in the English language but the accused did not understand it. He also weighed all the packages and found the overall rough estimated weight to be 3.5 kilogram.

[20] PW7 then carried out a 100% check on the contents of the green backpack (P14) and took out everything from this bag and among the items he found was, the Iranian identification card

of the accused, a bank card, an electronic ticket and some clothing. He could not remember all the items but instructed his officer Chin Chaw Tee, to list down all the items in a Search List where he signed it.

[21] Next PW7 instructed his officers to bring the accused and all the exhibits over to the customs office at the State Prevention Complex in Perai. Customs officer Yuslizan bin Yusof drove the departmental car with PW7 sitting beside him and the accused sat behind beside customs officer, Selvaraj a/l Mariannan. They started at 11pm and reached the Complex at about 11.30pm and on arrival there, the accused was brought up to the second floor of the premises where PW7 met the investigating officer that is Mohammad Rusdi bin Abdul Majid (PW8). PW7 then handed over the accused, the exhibits and the Borang Serah Menyerah to PW8 around 11.45pm. After the handing over, PW7 returned to his office at the Narcotics Division Unit in Bagan Jermal.

[22] Teoh Choon Ping (PW3) the chemist gave evidence that on 18 February 2011, he received a sealed package marked 'X' from PW8 and inside it was a cardboard box containing five carbon paper packages wrapped with plastic. Each package contained crystalline substances and after analysing them, he found all the substances to contain methamphetamine and this type of drug being listed in the First Schedule of the Dangerous Drugs Act 1952. On 23 August 2011, he returned the sealed package to PW8.

[23] The prosecution's next witness, the investigating officer PW8 gave evidence that on 16 February 2011 at about 11.45pm, he received the accused, an Iranian national, a black bag with the brand "Eminent" (P12) and a green backpack (P14) from PW7 including five packages wrapped with blue carbon and transparent plastic. PW7 also gave him a Borang Serah Menyerah and Search List. PW8 also received the passport belonging to the accused, an electronic ticket, two boarding passes and a slip baggage tag in the name of the accused, his personal belongings like a belt, a wrist watch, clothes and a pair of shoes.

[24] After receiving all the exhibits, PW8 kept them in his room and the five packages suspected to be drugs he kept them inside his iron cabinet and locked it. He held the keys to his room and the cabinet which no one had access to them. PW8 next directed

the customs photographer to take photographs of the exhibits including the packages suspected to be drugs before they were sent to the chemist for analysis to confirm whether they were drugs. Before the drug exhibits were sent to the chemist on 18 February 2011, the exhibits were all the time under the custody of PW8. On 23 August 2011, PW8 received back the box "X" containing the drug exhibits from the chemist and he straight away gave it to the Store Officer, Semail bin Mohd Yusoff (PW2) to be kept in the strong room.

[25] The prosecution's last witness Muhammad Kheri bin Abdul Aziz (PW9) a Customers Service Officer at the Penang Bayan Lepas International Airport testified that on 16 February 2011, he was on duty in the International Arrival Hall of the airport beginning his work from 8am to 10pm and his duty was to arrange for the baggage clearance in the arrival hall. PW9 is working for the KL Airport Services Sdn Bhd for Silk Air.

[26] PW9 narrated that around 2.30pm the same day, he was working alone in the arrival hall on the ground floor and at that time, Flight No. MI 360 from Singapore had landed. PW9 noticed one baggage still on the rotating carousel unclaimed and he retrieved the bag from the carousel and put it on the floor. He examined the number of the baggage tag with the name on it in the system and after that, he scouted around the immigration section and saw one tall, thin and fair-skinned male passenger later identified as the accused still remaining behind there.

[27] At that time, the accused was filling up a form in relation to his arrival and PW9 asked him from what flight he had disembarked and the accused answered from Singapore Flight MI 360. PW5 helped the accused to fill up the form as he had no knowledge of the English language and did not know the manner in filling it up. After helping him to fill up the form, PW9 brought the accused to the immigration counter to have his passport stamped and then took him to the baggage area which is about two to three metres away from the immigration counter.

[28] At the carousel area, PW9 showed the bag that he had lifted up from the carousel and put on the floor to the accused and asked "Is this your bag"? The accused answered positively and took the bag saying "Thank you" and then headed towards the customs checkpoint.

[29] PW9 gave evidence that he had compared the details in the claim tag together with the electronic ticket found in between the pages of the accused passport with the details on the baggage tag and found that the name of the passenger and the baggage tag number are the same.

[30] After PW9 had finished testifying, the prosecution closed its case and offered the following witnesses for the defence:

(a) Chin Chaw Tee

(b) Yuslizan bin Yusuf

(c) Mohd Nasir bin Sapri

(d) Tajudin bin Abdullah

(e) Selvaraj a/l Mariannan

(f) Norhayati binti Ahmad

(g) CS Sureinthiran a/l Chandvasegaran

(h) Tarmizi bin Johari

(i) El Nara anak Sission

(j) Shaharudin bin Sidin

(k) Misbahudin bin Parmin

(l) Thevakumar a/l Ramasamy

(m) Lau Hoon Chew

(n) Chan Tai Lee

(o) Lee Sian Khoon

[31] Defence counsel only needed a representative from a baggage manufacturing factory in Taiping, Perak, as a witness if the defence were called.

Indication Of Defence Case By Its Line Of Cross-Examination

[32] Overall Perspective By The Court

(a) The bag (P12) and its contents does not belong to the accused and he having no knowledge of the English language, had gestured to communicate to the customs officers about it at the airport but they could not understand it.

A (b) The hidden drugs were not visible to the naked eye, thus the accused had no *mens rea* knowledge of their presence.

(c) There was a possibility that the bag (P 12) was misplaced as its trolley handle and another handle were loose when the
B accused first retrieved it or there was access to it by unknown persons who had concealed the drugs inside the secret compartment.

At The Close Of The Prosecution's Case

C *Submissions*

The Defence

Prima Facie Case

D **[33]** Learned defence counsel pointed out that at the end of the prosecution case, the trial judge must undertake a maximum evaluation of all the evidence tendered and if there were inferences favourable to be drawn from the evidence, the inference most favourable to the accused must be drawn by the court.

E

[34] He cited *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 (FC); *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC) and *Balachandran v. PP* [2005] 1 CLJ 85 (FC) to support his argument.

F

No *Mens Rea* Knowledge

[35] The key witnesses for the prosecution that is PW6, PW7 and PW8 all had testified that the drugs were hidden inside the bag and could not be seen from outside and the evidence shows
G that the bag was forcefully opened in order to be able to see the drugs. Hence the accused had no knowledge of the concealed drugs.

Exhibit – P12; Denial

H

[36] The accused had denied that the incriminating bag (P12) belongs to him and the clothes (P12B; C1-C10) inside it are not his. Having no knowledge of the English language, he had used head and hand gestures to try to tell the customs officers that
I P12 was not his but they could not understand him. There was no attempt to see whether the clothes fitted the accused and no DNA (deoxyribonucleic acid) profiling was carried out on the clothes recovered from the incriminating bag.

P12 Movement

[37] Besides, there was no evidence led on the movement of the bag (P12) during its flight from Dubai, United Arab Emirates to Penang, Malaysia. The bag was not locked based on the evidence of the witnesses for the prosecution, thus anyone could open the bag and "manipulate it." This shows that the accused had no custody, control and knowledge of all the contents inside exh. P12.

Evidence Of PW6 And PW8

[38] The evidence of these two witnesses conflicted and learned defence counsel stopped here.

Therefore the prosecution had not established a *prima facie* case against the accused and he should be set free without his defence being called.

Prosecution

Prima Facie Case

[39] The learned deputy public prosecutor submitted that at the close of the prosecution case, it must establish a *prima facie* case against the accused and referred the cited case of *Mohd Radzi Abu Bakar* to drive home the point that there must be a maximum evaluation of the prosecution's evidence carried out by the court in order to decide whether such a *prima facie* case had been made out against the accused.

Possession

[40] She also cited *PP v. Denish Madhavan* [2009] 2 CLJ 209 (FC) and *Chan Pean Leon v. PP* [1956] 1 LNS 17 to illustrate what elements are needed to constitute possession.

Unchallenged Evidence

[41] The prosecution contended that it had proved the ingredients of the offence that is, custody, control and knowledge in that the accused had come from Iran to Malaysia by flight and flew by Singapore Silk Air to Penang. At the material moment, he was seen by PW9 carrying the incriminating bag (P12) containing the drugs in question.

[42] The baggage tag attached to the handle of P12 bore the name of the accused and its details corresponded with the details in the claim tag that was found to be in the possession of the accused.

[43] The bag was held by the accused and under his control on arrival at the Penang Bayan Lepas International Airport. The accused had admitted to PW9 that the bag belonged to him and he had never denied that P12 does not belong to him to PW4, PW5, PW6 and PW7.

[44] The amount of drugs involved is huge. *PP v. Suzie Adrina Ahmad* [2006] 3 CLJ 889 and *Wjchai Onprom v. PP* [2006] 3 CLJ 724 (CA) was cited to show the element of trafficking.

Hidden Drugs In Secret Compartment

[45] The mere fact that the drugs wrapped with carbon papers and concealed in a specially constructed compartment inside the black coloured bag (P12) shows that the accused had knowledge of the drugs. The Federal Court case in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 (FC) was cited to support the contention of the learned deputy public prosecutor.

Chain Of Evidence

[46] There was no break in the chain of evidence beginning from the airport where the exhibits, in particular the drugs were seized and taken into custody by the customs officers, kept and sent to the chemist and returned to the customs until produced in court.

[47] Therefore, it was submitted that the prosecution had made out a *prima facie* case against the accused and his defence ought to be called.

The Court's Findings

Prima Facie Case

[48] At the close of the prosecution's case, the court takes note of the provision of s. 180(1), (2), (3) and (4) of the Criminal Procedure Code especially sub-s. (4) which states:

> For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

Relevant Case Law Authorities

[49] The following case law authorities enunciated principles of law in relation to how the trial court should decide whether a *prima facie* case has been established:

(a) *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 (CA):

> The duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a *prima facie* case against the accused.
>
> The judge has only one exercise to undertake; he must subject the evidence of the prosecution to a maximum evaluation and then ask himself this question: If I decide to call upon the accused to enter his defence, and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative, then no *prima facie* case has been made out, and the accused is entitled to an acquittal.

(b) *Balachandran v. PP* [2005] 1 CLJ 85 (FC):

> The Federal Court referred to *Mozley and Whiteley's Law Dictionary* on the definition of the phrase "*prima facie case*" as:
>
> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer. A *prima facie* case, then, is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side.
>
> Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal, it follows that if it is not rebutted, it must prevail. Thus if the accused remains silent, he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative, then a *prima facie* case has been made out. This must as of

A necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

(c) *PR v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC):

B This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence C admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference, that is favourable to the accused.

(d) *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 (FC):

D This Federal Court case also emphasizes the duty of the trial judge to undertake a maximum evaluation of all the evidence tendered at the end of the prosecution case as well as to assess the credibility of the prosecution witnesses. It also states that if the evidence for the prosecution admits E two or more inferences, the trial court must draw the inference favourable to the accused.

Credibility Of The Witnesses

[50] The court finds that it did not have any reason to doubt F the credibility of the prosecution witnesses because the accused being his first time to Malaysia is a total stranger to all the prosecution witnesses. Therefore it follows that none of the witnesses would have any personal grudge against the accused so as to embellish the prosecution case against the accused or even G to lie in court to get him convicted of the offence.

[51] In *PP v. Mohamed Ali* [1962] 1 LNS 129, Thomson CJ (as he then was) viewed that when a police witness (by analogy a customs officer) says "something that is not inherently improbable H his evidence must in the first instance be accepted".

[52] Gunn Chit Tuan J (as he then was) in *PP v. Teh Cheng Poh* [1979] 1 LNS 82 (HC) agreed with the view of Thomson CJ with regard to police witness in *Mohamed Ali*'s case.

I

[53] This court opines that customs officers like other enforcement agencies are public servants merely discharging their duty and their evidence ought to be believed and all the more so if the accused at the trial is a complete stranger to them unless there is compelling evidence to the contrary not to do so.

[54] In any event, no evidence was led by the defence to show that any of the prosecution witnesses for reasons better known to the accused himself had harboured any personal malice against him during his arrest. What is more, PW9 not a customs officer, was a public witness who does not know the accused at all had given damning evidence against the accused.

Ingredients Of The Offence

Possession

[55] In *Chan Pean Leon v. PP* [1956] 1 LNS 17 Per Thompson J:

> Possession itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edn., p. 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such, that he may be presumed to intend to do so in case of need.
>
> ... there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him ... It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so ... Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances ... .
>
> Once possession is proved then before the accused can be convicted it is necessary in addition to prove *mens rea*.

(Incidentally, *Ratanlal's Law of Crimes* 14th edn on p. 379 also quoted from *Stephen's Digest of Criminal Law* on what constitutes 'possession').

[56] In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53 Taylor J stated that "the word "possession" is one of the most difficult English words. The primary legal meaning of 'possess' is to have 'possession', as distinct from ownership … Probably the most helpful definition of possession is:

> The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.' This definition does not express, but it does imply that the meaning of the word includes some element of knowledge. A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it."

[57] *Wharton's Law Lexicon* 14th edn on p. 777 describes 'possession' as "The state of owning, or having a thing in one's own hands or power".

[58] Applying the definition stated in these authorities, the black bag (P12) was in the name of the accused as seen in the baggage tag and the claim tag throughout the flight from Dubai Airport while in transit at the airport in Singapore to the airport in Penang. Transit in Singapore to Penang. The accused even admitted to PW9 that P12 was his at the carousel and took it away. Thus P12 was under his control at all material time. It is common knowledge amongst airline passengers and travel agencies that once a passenger's luggage is checked in at the airport counter at any airport in the world, no Tom, Dick and Harry let alone the passenger himself, can have access to it in the luggage department of the airport concerned and only authorised airport personnel like the luggage handlers, the airport security personnel and the airport top management personnel will have access to it.

[59] The same can be said when the particular luggage is in transit at any airport in the world. It is noteworthy to say that such a practice is now even more stringently carried out at all airports in the world in the light of international terrorism which rears its ugly head especially after the 11 September 2001 crash of the World Trade Centre in New York, in the United States of America, which caused an inferno and loss of thousands of innocent lives, by Al Qaeda terrorists piloting a hijacked aircraft.

[60] Hence the court infers in all probability that P12 which the accused had retrieved at the Penang Bayan Lepas International Airport on that fateful day was the same bag that he had checked in at Dubai International Airport.

[61] The very fact that he admitted to PW9 that P12 was his and carried it away only shows that the accused had the intention to do whatever he had wanted to do with P12 and its contents to the exclusion of others. The accused when asked by PW9 "Is this your bag (P12)?" and PW9 testified that "Dia kata memang beg dia".

[62] This vital piece of evidence was never challenged at all by learned defence counsel and in *Wong Swee Chin v. PP* [1980] 1 LNS 138 (FC) the Federal Court held that there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. The failure of the defence to cross-examine a witness on crucial part of the case against him did not fall under any of the exceptions to this general rule as stated in the same case, bearing in mind that especially PW9 was a public witness.

[63] PW9 gave evidence that the accused took the bag and said "Thank you" to him and left with the bag to go to the customs checkpoint.

[64] Here the prosecution had even adduced direct evidence of the accused having control over the incriminating bag (P12) independent of the presumption under s. 37(d) of the Dangerous Drugs Act 1952 (Act 234). The claim (slip) tag and the electronic ticket (P14A) found in the possession of the accused which tallied with the details on the baggage tag (P12A) attached to the bag like the name of the accused, the flight number and the baggage number only strengthens the inference of the court that P12 belongs to the accused.

Knowledge

[65] PW8 had given evidence repeatedly twice that at the time of the scanning of the bag (P12), the accused did not ever say or gesture that the incriminating bag was not his until when the 100% check was being carried out in the Meeting Room at the Airport Customs Office then only the accused gestured that the

bag did not belong to him. Although the court is aware that it is trite law that generally an accused has the right to remain silent and of the principle stated in *Goh Ah Yew v. PP* [1948] 1 LNS 13 which is:

> No inference can be drawn against an accused person in a criminal trial. There is no duty cast upon an accused to call any evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other ...

[66] Although this court does not draw any unfavourable inference against the accused, nevertheless, the court is of the opinion that his failure to react spontaneously in denying that P12 was not his at the material time when the scanning was done on P12 had affected the probative value of his evidence in denying vehemently by gesture that P12 was not his bag.

[67] PW4 said that after the bag was opened, the accused did not say anything to her at the scanning machine. Again PW5 answered while being cross-examined that the accused did not ever communicate to him by using sign language that the bag (P12) was not his.

It Was Only In The 100% Examination Room That The Accused Tried To Gesticulate To PW6 Which The Latter Did Not Understand

[68] The court is of the view that even before the scanning had begun, the accused should have immediately said that P12 was not his and not when the 100% check was done on the bag where the drugs were eventually found, then only he gestured to PW6 apparently trying to show PW6 that the incriminating bag did not belong to him. At least when a suspicious image surfaced on the scanner screen when P12 was being scanned, bearing in mind that P12 had been scanned thrice, the accused should have uttered immediately that P12 did belong to him there and then but he did not do so for reason better known to himself.

[69] This court is of the view that with regard to ordinary and sensible human behaviour in daily life, a spontaneous answer or reaction to the airport authorities from a passenger exonerating himself in that the luggage being scanned which shows suspicious images on the screen is not his, would have carried more probative value rather than after the scanning is done and when

a physical search is being conducted on the contents and the interior of the luggage where the hidden drugs are eventually found then only he says so.

[70] The only inference that the court made is that the accused had knowledge of the nature of the drugs concealed inside the specially constructed or modified bag and was conscious of its presence.

See *PP v. Badrulsham Baharom* [1987] 1 LNS 72.

[71] In addition to his failure to communicate instantly by hand gesture to PW4 and PW5 that P12 did not belong to him, the court notes that by admitting to PW9 that the bag (P12) was his on 16 February 2011, the only inference that the court draws is that by his admission it follows that the accused ought to have know about the contents inside the bag including the hidden drugs.

[72] PW6 had given evidence that the first time he saw the accused, he was the last passenger. He said "Dia penumpang yang terakhir sekali".

[73] PW9 testified "Masa itu saya bertugas seorang diri di Arrival Hall, ada satu bagasi masih berlegar di atas carousel, saya menurunkan beg itu ke bawah dan saya memeriksa nombor bagasi serta nama yang terdapat di beg tersebut di dalam sistem. Selepas itu, saya memeriksa di bahagian imigresen di sebelah kanan, saya dapati ada seorang penumpang (the accused) yang masih tinggal di imigresen di mana pada masa itu, beliau sedang mengisi borang ED kad untuk ketibaan".

[74] PW9 said that the first piece of baggage on the carousel came out at about 2.40pm and at 2.50pm all the baggage had already come out on the carousel. P12 was only retrieved by the accused at 3pm.

[75] The conduct of the accused in delaying to collect P12 from the carousel conflicts with the normal behaviour of disembarking airline passengers rushing to the carousel to take back their baggage in case their baggage are mistakenly retrieved by other passengers or even stolen by them or if they delayed too long, their baggage will be transferred off the carousel to be taken to the baggage office for collection which means time will be wasted to claim them from the office.

[76] The contention of the defence that the concealed drugs could be seen by the accused is baseless.

[77] In *Zulfikar Mustaffah v. PP* [2001] 1 SLR 633, the Singapore Court of Appeal observed:

> In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspaper and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
>
> We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *PP v. Hla Win* [1995] 2 SLR 424 (at 438):
>
> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[78] Therefore, the court infers that the accused was conscious and had knowledge of the presence of the hidden drugs inside P12 and had intentionally delayed in retrieving P12.

Power Of Disposal

[79] In *PP v. Salleh Zakaria & Anor* [2010] 4 CLJ 671 (CA), the Court of Appeal viewed that the power of disposal means that an accused knows of the whereabouts of the drugs and can deal with them as if they were his own. The baggage tag (P12A) and the claim tag (P14A) in the possession of the accused according to the evidence given by PW9 showed that the bag P12) belongs to the accused. Applying this definition, the accused here knew and was conscious of the presence of the concealed drugs inside the specially constructed or modified compartment of the bag and at that material time at the airport, he was alone with them, no one else was with him, thus he had the power of disposal over the drugs. He was seen to be in physical control of P12.

[80] All in all, the prosecution had proved that the elements of possession that is control, knowledge, trafficking (to be delved into below) and the power of disposal over the drugs and thus the presumed possession under s. 37(d) of the Dangerous Drugs Act 1952 (Act 234) applies. Nonetheless even independent of this presumption, there is direct evidence led by PW4, PW5 and PW6 to show that the accused had physical possession of the bag containing the hidden drugs at the material time.

Trafficking

[81] By virtue of s. 2 of Act 234, this court views that based on the prosecution evidence, 'concealing' and/or 'carrying' are applicable in this case. The accused was seen by a public witness (PW9) retrieving the bag (P12) from the carousel and carrying it to the customs checkpoint. The evidence of PW6, PW7 and PW8 showed that the drugs were hidden in a secret compartment of P12 which was specially modified or constructed. See *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 (SC) and *PP v. Lim Hock Boon* [2009] 3 CLJ 430.

[82] Based on a maximum evaluation of the prosecution evidence, the court finds that the prosecution had established a *prima facie* case against the accused and thereby called upon him to enter his defence.

[83] The three alternatives, remaining silent, giving an unsworn statement from the dock and testifying from the witness stand and their implications were explained to the accused through the Iranian interpreter in the presence of learned defence counsel. The accused chose to give evidence from the witness box.

Defence Case

Defence Story of the Accused

[84] The accused gave evidence that he hails from Iran and his aim in coming to Malaysia was to do sight-seeing, meet up with his old friend called Mohamed who is also from Iran as well as to do some shopping. In his letter to the accused, Mohamed told the accused that he could meet him either in Penang or Kuala Lumpur. The accused said that he planned to stay two days in Penang and three days in Kuala Lumpur. If he could not meet up with Mohamed, the accused would stay in a hotel.

[85] The accused left his house in Tehran with one baggage and one backpack on 14 February 2011 where he departed from Iran Imam Khomeini International Airport to Kish Island and then to Dubai and from Dubai International Airport he flew in transit to Singapore Changi International Airport, to Penang Bayan Lepas International Airport, Malaysia. He packed 4 pairs of trousers, 4 long sleeved shirts, 1 neck tie, 1 long towel, 4 underwears and 1 pair of black shoes inside the baggage. His backpack contained 1 small blue towel, 1 red singlet, 1 white T shirt, 1 pair of shorts, 1 blue underwear, 1 pair of blue socks, perfume, bank card, national card, Dubai Visa, Kish Island ticket and these are the items that he could only remember. The accused only checked in with the unlocked baggage but not the backpack which he carried with him onto the aircraft cabin.

[86] At Dubai International Airport, the accused said that his black coloured baggage passed through the scanning machine without any hitch.

[87] The accused arrived at the International Airport in Singapore on 16 February 2011 around 8am Singapore time, and waited at the airport there in transit for about three or four hours before flying to Penang. He said that he arrived at the Penang Bayan Lepas International Airport the same day around 2pm or 3pm. After disembarking from the aircraft, the accused headed towards the immigration and showed his passport to a woman immigration officer who after returning it to him, gave the accused a form to fill up and pointed out to him the place where a pen and sample copy can be found to guide him.

[88] The accused tried to fill up the form but he made several cancellations on the form and returned to the woman officer to ask for a new form. At that moment, the accused said that a slightly fat man wearing a white shirt walked to his direction while he was in the midst of talking on his handphone and pointed to him about seven or eight pieces of baggage still on the rotating carousel and asked the accused whether his baggage was amongst them. The accused answered; "Yes, that is my luggage."

[89] The accused requested the man to help him to fill up the form and gave his passport to him. After helping the accused to fill up the form, the man gave back the form and the passport to the accused. The accused went back to the immigration counter

where the woman officer stamped his form and when the accused wanted to retrieve his baggage, he saw the same man wearing the white shirt standing nearby the baggage.

[90] He went to examine a baggage which looked like his baggage and after checking the baggage tag, he took the baggage (P12) but felt the baggage handle where the baggage tag was attached and having a little problem. He took the baggage by grasping the other handle which pulled the trolley baggage and after walking two steps, his hand felt the same problem with this other handle. The accused stopped to check out the problem and the same man with the white shirt walked towards his direction and asked him about the problem, the accused replied "It's okay, thanks".

[91] The accused then brought his baggage to the scanning machine at the customs checkpoint and put his baggage on it and just as he wanted to retrieve the baggage, a woman officer manning the machine directed him to have his baggage scanned again. The accused obeyed the order and later 'they' asked him to open the baggage and he complied with the order. At the same time, his handphone rang and at that moment too, he noticed that some clothes in the baggage were not his.

[92] 'They' next directed the accused to open the straps holding the clothes and to take out all the clothes from the baggage but the accused used hand gesture to show that the clothes did not belong to him. 'They' showed gesture likened to "No problem, you just take them out." At that time, he was talking on the handphone and 'they' shook his baggage.

[93] Simultaneously the woman officer together with two male officers scanned his baggage twice and while they were examining his baggage, the accused took out clothes from his backpack (P14) and showed them that they were his clothes. The accused said they instructed him to put his pair of trousers amongst the clothes taken out from the baggage.

[94] After this, they brought him together with the baggage to one room and ordered him to sit on a chair while they searched the interior of the baggage by knocking and using a knife and a screwdriver. He saw them cutting a part of the exterior of the baggage.

[95] The accused thought 'he' (officer) was tired and the accused became angry because his time had been wasted and he went over to 'him' to help 'them' to cut. After it was cut open fully, he said "Now you can check easily" and 'they' tried to put their hands inside the layer of the baggage. 'They' talked and laughed and asked the accused "What is that?" but he did not see what they meant. 'They' took out a little blue plastic and showed him and asked "What are these, are these yours?" The accused did not understand and was taken aback and could not communicate and did not know what to do.

[96] Afterwards, a woman and some male officers approached him and asked "Is this luggage yours?" The accused understood a little bit and told them he bought the baggage in Syria with his father seven or eight years ago and they brought him to a Meeting Room and an officer asked him the same question. He answered in the Persian Language and said he is from Iran and four other questions he did not answer.

[97] The accused also tendered his three cautioned statements (D28), (D29) and (D30) respectively and argued that the testimony of the accused is consistent with the contents of the three statements.

Court

[98] After the accused had finished giving evidence, learned counsel asked for another adjournment in order for him to call a witness which is a staff member from a luggage manufacturing factory located in Taiping, Perak, apparently to testify whether the baggage (P12) is in its original condition or had been specially modified or constructed with regard to the secret compartment where the drugs were found concealed.

[99] The court refused to grant the adjournment for the following reasons:

(a) The court had granted a request for adjournment asked by learned defence counsel to locate the potential witness working at a luggage factory in Taiping, Perak, on 3 May 2012;

(b) When the investigating officer PW8 went to the luggage factory located in Taiping, Perak, to look for the potential witness, he was told that this particular staff member had gone overseas;

(c) On his second trip down to the factory, he could not locate the witness and PW8 even went to his house but was told by someone in the house that this staff member was not around;

(d) The court viewed this particular witness for the defence was obviously trying to evade coming to court and precious time of the court would be wasted to postpone the case again. In all likelihood, he could still not be traced; and

(e) In any event, the court opines that this particular witness is not an important witness for the defence or even relevant at all because the bag (P12) belonging to the accused was bought in Syria and there was no evidence adduced to show that it was manufactured from the Taiping factory.

Closing Arguments

Defence

Dubai Airport

[100] The accused did not see the Dubai Airport's staff attaching the baggage tag to the handle of the baggage of the accused which is one black bag similar to P12. P12 and the backpack (P14) had passed through the scanning machine at Dubai Airport without any problem.

P12

[101] The baggage was not locked at all. It has four places for decorative locks which are not real locks. The personal belongings, four pairs of long pants, four long sleeved shirts, one neck tie, one pair of black shoes, one long towel and four underwears which the accused packed into his baggage was not challenged by the prosecution including the scene at the Dubai Airport where his baggage passed through the security clearance.

[102] All this was not challenged by the prosecution.

Baggage Not In Possession Of Accused

[103] Since the time the accused checked in at the Dubai Airport with his baggage on 15 February 2011 until the time he arrived at the Penang Bayan Lepas International Airport on 16 February

2011, the accused was not in possession of his baggage and had no physical control over it. He also had no knowledge of the drugs hidden inside P12.

At Bayan Lepas International Airport

[104] When PW9 showed the accused some luggage on the floor nearby the carousel and asked him whether his luggage was amongst them, the accused went to collect his luggage and felt something wrong with both its handles. This shows that there was tampering with P12.

[105] At the scanner when the clothes of the accused were taken out of the bag he sensed the clothes inside P12 did not belong to him and later in the 100% examination room in the customs office at the airport, the accused had shown by gesture that they were not his. He even took out a pair of short pants from his backpack (P14) to show that is the size of his pants but this piece of item was put into P12 by the customs officer. The accused had denied that the clothes inside P12 were his by gesturing from the beginning.

[106] The accused even helped to cut the luggage and showed them, "You can search easily" and this only reflected the absence of knowledge of the hidden drugs.

[107] The accused denied that P12 was the same piece of luggage that he had checked in at Dubai Airport as there was a document and a photo not belonging to him inside the luggage that he had brought to the airport there and also there were no hidden drugs. The original bag of the accused could have been exchanged for P12 or the loose handles of P12 could have meant that it had been tampered with or had been "manipulated".

Cautioned Statements

[108] The three cautioned statements of the accused (D28), (D29) and (D30) supported his testimony in court and the defence of the accused is not an afterthought or bare denial.

P12A – Baggage Tag

[109] Learned defence counsel initially objected to the admissibility of P12A, the baggage tag attached to the handle of P12 but later at the trial he waived his objection. After he had dropped his objection, P12A was admitted by the court and

marked as an exhibit. Now he raised it again in his submission on whether P12A had complied with s. 90A of the Evidence Act 1950.

[110] The defence submitted that a doubt had been created on the prosecution case in that P12 and its contents including the drugs found, do not belong to the accused, especially when the baggage tag P12A did not comply with s. 90A Evidence Act 1950. Hence, the accused should not be found guilty of the offence and be acquitted and discharged.

Prosecution

Evidential Burden

[111] The learned deputy public prosecutor submitted that at the end of the defence case, the accused bears the evidential burden of proof to raise a reasonable doubt on the prosecution's case and cited *Balachandran v. PP* [2005] 1 CLJ 85 (FC) and *Adekunle Johnson Oshodi v. PP & Other Appeals* [1998] 1 CLJ 515 to support her submission.

Reasonable Doubt

[112] She referred to *PP v. Saimin & Ors* [1971] 1 LNS 115 to illustrate the meaning of 'reasonable doubt.'

Defence Version

[113] The defence is a mere denial and the failure of the accused to call 'Mohamed' and another friend 'Bedzad' mentioned in his cautioned statement D29 to support his version only shows that he cooked up the defence in order to escape from the charge levelled against him.

[114] The mentioned case of *Lim Hock Boon* was cited to bolster up her contention where the Federal Court held:

> The respondent failed to cast a reasonable doubt on the prosecution's case. His defence was a mere denial. The court could give little weight to the respondent's evidence that his brother Lim Hock Kee had borrowed his car earlier because he had failed to call this person as a witness.

A ***Not An Innocent Carrier***

[115] The total evidence led shows that the accused was not an innocent carrier because he had first checked the bag (P12) near the carousel when asked by PW9 about the remaining baggage
B (P12) still there and said that it belongs to him.

[116] After examining P12, the accused did not complain anything about P12 to PW9 and straight away took it away.

[117] The slip or claim tag tallied with the personal details on the
C baggage tag (P12A) and the accused himself said that he had checked-in P12 at Dubai Airport.

[118] PW4 and PW5 had given evidence that while the scanning of P12 was going on and when P12 and its contents were
D examined at a nearby counter, the accused had never made any gesture to deny that P12 does not belong to him.

[119] The accused had testified that after the drugs were discovered and when one of the officers asked him "Is this luggage
E yours"? and he replied "I bought this luggage from Syria with my father".

Frequent Changes In The Accused Story

[120] The accused said that he came to Malaysia for a holiday
F and to see his friend Mohamed contradicted with his cautioned statements that is D28, D29 and D30 for example:

> In D30 (Q&A 5 and 18), the accused said that he came to Malaysia to visit his friend and to buy women's clothing here to bring back to Iran to sell them to his family members in order to
G get back some of the expenses that he spent in Malaysia. In court, he said that his main aim in coming to Malaysia was to tour the country and he had enough money for the trip.

Trial

H **[121]** During the prosecution's case, the defence questioned PW6 and PW7 by saying that the accused showed the clothes from his backpack (P14) to compare that those clothes inside P12 do not belong to him. However in his testimony, the accused said that he took out his Adidas black pants (P12B4) but was asked
I to put it amongst the clothes inside P12, at the counter. Thus she said that there was a contradiction.

[122] Summing up, the learned deputy prosecutor submitted that the defence had failed to cast a reasonable doubt on the prosecution's case and it had proved its case beyond reasonable doubt against the accused and thus the accused should be found guilty and convicted of the offence.

The Court's Findings

At The Conclusion Of The Trial

[123] Section 182A(1) of the Criminal Procedure Code:

> At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

Burden Of Proof

[124] In *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 (SC), the Supreme Court held:

> ... that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. To earn an acquittal, his duty is merely to cast a reasonable doubt on the prosecution's case. In the course of the prosecution's case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence's point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove its case beyond reasonable doubt.

See also *Mat v. PP* [1963] 1 LNS 82.

Issue

[125] Whether the black baggage P12 which contained the incriminating drugs inside a specially modified or constructed secret compartment was the same baggage that the accused had checked-in at Dubai Airport on 15 February 2011 when it eventually arrived at the Penang Bayan Lepas International Airport, or that it had been misplaced or exchanged somewhere

along the flight or at the airport in Penang and instead of the original bag, P12 was taken by the accused, or whether person or persons unknown to the accused had access to his original baggage (P12) had created a secret compartment inside the baggage to conceal the drugs inside it?

Analysis Of The Defence's Story

[126] The core of the defence is that the baggage (P12) containing the incriminating drugs discovered embedded inside a specially modified or constructed secret compartment does not belong to him as the accused claimed that the clothes found inside P12 are not his. He claimed that the bag had been misplaced or exchanged along the flight from Dubai Airport while in transit at the airport in Singapore to the airport in Penang or person or persons unknown to him had tampered with the baggage and created the secret compartment to hide the drugs.

Exchanging The Original Baggage At Bayan Lepas International Airport

[127] PW9 had answered both in examination-in-chief and in cross-examination that he arrived first at the carousel even before all the baggage was put on it. He said that the first piece of baggage came out on the carousel at about 2.40pm that particular day and at 2.50pm all the baggage had already come out on the carousel and P12 was only collected by the accused at 3pm.

[128] When being cross-examined, he answered that no one (to the court's understanding, a suspicious character) could have taken or exchanged the baggage while still on the rotating carousel as he was always standing nearby the carousel.

[129] Hence the claim of the defence that his original baggage could have been exchanged at the carousel in Penang Airport does not hold water.

Tampering With P12

[130] The claim of the accused that P12 had been 'manipulated' in other words tampered with by certain person or persons to make the secret compartment and concealed the drugs inside does not make sense. Who would have done it? The accused did not lead a shred of evidence to show that he had enemies in Iran,

Dubai, Singapore or elsewhere in the world that they would have done it for revenge. If there were, the accused did not give evidence on why they would have done so.

[131] As explained above, even assuming that the person had intended to do so, it is very difficult to gain access to P12 which had already been checked-in at Dubai airport. In all likelihood, he would have been caught as to create such a secret compartment would have taken up a lot of time by the presence of security personnel and closed circuit television.

[132] In the light of the evidence given by PW9, a public witness, in which the accused told him that P12 was his baggage on that material day at the airport and considering after examining P12, the accused did not ever complain at all to PW9 that someone had meddled with his baggage the court views that the accused was not telling the truth because he was caught red-handed with the incriminating drugs as the saying goes, even a drowning man would have clutched at the straw. Besides, the court has no reason to doubt the credibility of PW9 who is a complete stranger to the accused.

[133] If P12 had been tampered with as he claimed both handles of it were problematic or loose, as an ordinary reasonable man the natural thing for him to do was to complain to the airport authority in charge of baggage but he did not do so.

[134] PW9, the customer service officer who works for KL Airport Services Sdn Bhd for Silk Air had testified that he arrived at the carousel area before all the baggage were downloaded onto the carousel. Thus, if anyone had tried to tamper with P12, PW9 would have known as he said that he was always beside the carousel.

[135] PW9 also said that he had brought along with him documentary record at the trial and gave evidence that for Flight MI 360, there was no complaint by any passenger about loss or damage regarding baggage from that particular flight.

[136] When the exhibit was produced in court, the court did not notice any visible signs of tampering with P12. If the handles were loose they were the result of the customs officers trying to search for the secret compartment and the hidden drugs and not before the search was carried out. PW6 testified in examination-in-chief:

A Tetapi kami masih tidak menjumpai apa-apa, lepas periksa lagi, kami jumpa seumpama ada secret compartment, kami gores dengan pisau di bahagian tepi dan korek dengan tangan kanan saya, saya rasa ada benda seperti garam.

B **[137]** PW7 gave evidence in examination-in-chief:

Saya membuka lining getah dengan menggunakan peralatan seperti pisau dan screwdriver di sekeliling beg untuk melihat ruangan rahsia yang terdapat pada beg tersebut.

C *Original Baggage Had Been Misplaced Or Exchanged*

[138] After scrutinising the overall evidence adduced by the prosecution and the defence, the court infers that P12 belongs to the accused and there was no exchange of it and it was not misplaced. There was no probability of P12 being misplaced or D exchanged for a similar baggage because the baggage tag (P12A) with the name of the accused, the flight number and the baggage number, was attached to its handle. Chan Tai Lee (SD 1) a Silk Air Customer Service Officer based at the Bayan Lepas International Airport had said that she had worked for the E company for almost 11 years. She said that baggage tags are issued and printed by a computer by the check-in agent.

[139] Incidentally, with due respect to learned defence counsel who had earlier objected to the admissibility of P12A but later F waived the objection at the trial and then raised the issue of its admissibility again in his submission for not complying with s. 90A of the Evidence Act 1950 is most unprofessional for him to do so as this had taken the court by surprise and putting the prosecution at a disadvantage to reply to his contention. He is an G officer of the court and the court believed him and should not have gone back on his words.

Exhibit P12A – Baggage Tag

[140] In any event, in *Gnanasegaran Pararajasingam v. PP* [1997] H 4 CLJ 6 (CA) the Court of Appeal held that by virtue of the word "may" drafted in s. 90A (2) of the Evidence Act 1950 a certificate under the subsection is not mandatory for proving that a document was produced by a computer in the course of its ordinary use and so long as there is proof that a document is I produced by a computer, sub-s. (6) applies to deem the document to be produced by the computer in the course of its ordinary use. See *Ahmad Najib Aris v. PP* [2007] 2 CLJ 229 (CA).

[141] Risking repetition, Chan Tai Lee (SD1) a Silk Air Customer Service Officer working at the Penang Bayan Lepas International Airport had given evidence for the defence that baggage tags are issued and printed by a computer by the check-in agent. SD1 had worked for the Singapore Company for almost 11 years.

[142] Applying this authority, the evidence of SD1 shows that P12A was produced by the computer and this s. 90A(6) of the Evidence Act 1950 applies to deem P12A to be produced by the computer in the course of its ordinary use.

[143] Hence P12A is admissible.

[144] In addition to this authority, it is common knowledge amongst airline staffs the world over, tour companies and their agencies as well as frequent airline passengers that once a passenger checks in with his luggage at an airport to board a flight, his luggage will be weighed to find out whether it exceeds the permissible weight for surcharge and then a luggage tag will be attached to the handle of it bearing the name of the passenger and that flight and luggage numbers. This is a universal practice amongst airport check-in counters worldwide.

[145] Hence, the court can apply s. 114(e) of the Evidence Act 1950:

> That judicial and official acts have been regularly performed.

Cautioned Statements

[146] When D28 was recorded from the accused on 18 February 2011, the accused said that after following the instruction from the customs officer to take out the clothes from the bag, he realised that the bag did not belong to him.

[147] When asked whether he did wish to add anything or amend the statement given above? The accused answered "No".

[148] There was an interpreter. The court observes that he did not ever mention about gesticulating to the customs officers that P12 is not his. This failure to mention such an important fact cast doubts on his credibility.

D29

[149] The accused said that when P12 was opened, there was also a document with a photo including the clothes which are not his. PW5, PW6, PW7 and PW8 had all given evidence which did not say that a document with a photo had been found inside P12 and the court does not doubt their credibility.

[150] The court opines that "Mohamed" an old school friend whom the accused had lost contact for ten years had suddenly out of the blue sent him a telephone sim card through a mutual friend called "Bedzad" as Mohamed had probably forgot his address and that he received Mohamed's letter from someone whom he guessed is from Northern Iran and he does not know him is too far-fetched. This inference is even strengthened by the accused saying that he had thrown the letter away. Here was purportedly to be a letter from an old friend whom he had not met for ten years yet he threw it away defying common sense. A normal person would have kept it for further reference.

[151] Therefore the court infers that "Mohamed" does not exist and was fabricated to show his innocence.

D30

[152] The accused narrated that at the Airport in Singapore that he tried to telephone Mohamed but was unsuccessful. It is hard to believe that he needed to telephone Mohamed because regard to ordinary human conduct in daily life, Mohamed, if really existed, would have waited for him at the airport in Penang, being an old school friend who had not met the accused for ten years! But Mohamed informed him that he could either be found in Penang or Kuala Lumpur.

Clothes Inside P12

[153] The defence argued that the investigating officer (PW8) did not attempt to see whether the clothes inside P12 fitted the accused.

[154] The court views that the failure to do so does not weaken the prosecution's case as there was sufficient evidence to show that P12 belongs to the accused.

[155] The defence of the accused was a bare denial and his feeble attempt to explain how he came into possession of the drugs was not reasonable.

[156] For the reasons stated above, the court finds that the defence had not rebutted the presumption of possession and had not raised a reasonable doubt on the prosecution's case (bearing in mind the principle of law stated in *Mat v. PP*) and the prosecution had proved its case beyond reasonable doubt against the accused; the court finds the accused guilty of the charge and convicted him of the offence.

[157] It then sentenced the accused to death.